



MISLEADING CASES

III. – THE WHALE.

A.P. Herbert

A.P. Herbert made many great contributions to law and literature: mostly in his “Misleading Cases” – a long-running series of reports about fantastic yet realistic legal proceedings. Herbert’s comedic law stories began appearing in *Punch* magazine in 1924. One of the earliest, which we are pleased and amused to reproduce here – *The Whale*, from the October 15, 1924 issue – is a timeless study of the significance of motivation in the interpretation of legal language. Indeed, *Trimble et al. v. Reges* (the case discussed in *The Whale*) could easily have been cited by the U.S. Supreme Court in *Yates v. U.S.* (in which Justice Ruth Bader Ginsburg, writing for a plurality, concluded that a fish is not a “tangible object” under the Sarbanes-Oxley Act),¹ or the California Court of Appeal, Third District, in *Almond Alliance of California v. Fish and Game Commission* (in which Judge Ronald B. Robie, writing for a unanimous panel, held that “the bumble bee, a terrestrial invertebrate, falls within the definition of fish” under the California Endangered Species Act).²

— *The Editors*

Alan Patrick Herbert (1890-1971) was educated in the law but did not practice, opting instead for service in the British Navy (1914-18, 1939-45) and in Parliament (1935-50), and a career as a writer, most famously as a contributor to Punch magazine beginning in 1910. For some additional, and entertaining, commentary about Herbert, see Dwight H. Sullivan and Eugene R. Fidell, Winding (Back) the Crazy Clock: The Origins of a Benchslap, 19 Green Bag 2d 397 (2016).

¹ 574 U.S. 528, 549 (2015) (Ginsburg, J., joined by Roberts, C.J., and Breyer and Sotomayor, JJ.).

² 2022 WL 1742458 (Cal. Ct. App., 3d Dist., May 31, 2022).

TINRIB, RUMBLE AND OTHERS

V.

THE KING AND QUEEN.

(Before Mr. Justice BOOM.)

IN this unusual action, the hearing of which was begun to-day, an interesting point is raised concerning the rights and duties of the Crown in connection with a dead whale.

Sir Ethelred Rutt, K.C., for the plaintiffs, said: May it please your lordship, this action is brought by Mr. Tinrib, Mr. Rumble and the other plaintiffs named on behalf of the inhabitants of Pudding Magna, situated, melud, in the county of Dorset –

The Court. Where is Dorset?

Sir Ethelred. Melud, I have a map here. Dorset, melud, if your lordship will glance at the bottom left-hand corner – Dorset, melud, is, melud, Dorset –

The Court. Quite – quite. Get on, please, Sir Ethelred.

Sir Ethelred. I am greatly obliged to your lordship. Pudding Magna, melud, is situated in the north-east corner of Pudding Bay, or the Devil's Entry. The inhabitants are mainly fisher-folk of lowly origin and modest means, and, so far as can be ascertained, the place is not referred to in any of the works of Mr. THOMAS HARDY, Mr. WILLIAM WORDSWORTH or any other writer –

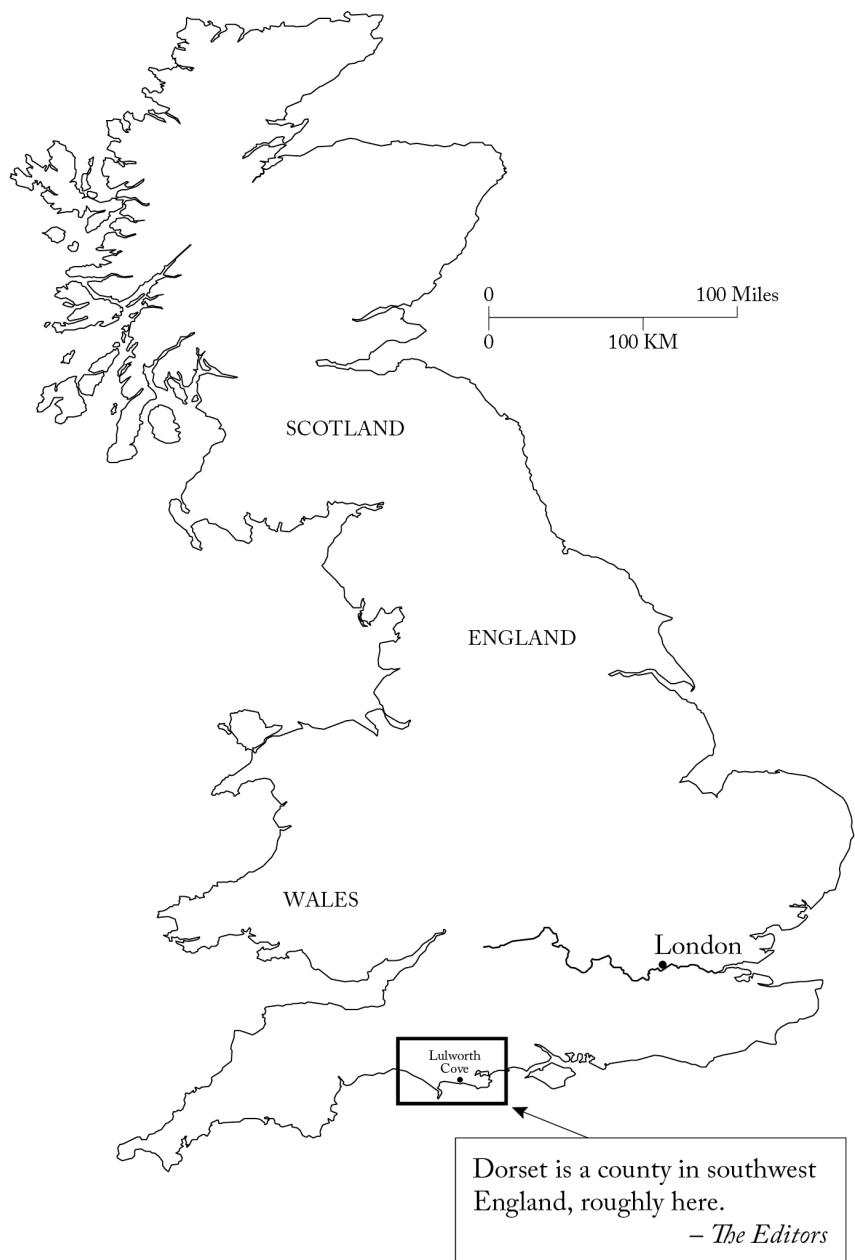
The Court. *O si sic omnes!*

Sir Ethelred. Ha! Melud, in the night of the 21st June last a dead whale was washed on to the shore of Pudding Bay, at a point south-west by south from the township of Pudding Magna. Now the whale, melud, together with the sturgeon and the swan, is fish royal and belongs to the King; or, to be precise, the head of the whale belongs to His Majesty the King and the tail to Her Majesty the Queen. Your lordship will recall the case of *Rex v. Monday*, 3 A.C. (1841), which decided the latter point.

The Court. I recall nothing of the kind.

Sir Ethelred. Your lordship is very good. The loyal inhabitants of Pudding Magna, melud, made haste to extract from the carcase of the whale the whalebone, the blubber and other valuable and perishable portions;

The Whale



with the intention, I am instructed, of holding them in trust for the Crown. And I may say at once that any other construction of their motives will be most strenuously resisted, if necessary, by sworn evidence. Three days later, melud, the wind, which had been northerly, shifted to the prevailing quarter, which is south-east —

Sir Wilfred Knocknee, K.C. You mean south-west.

Sir Ethelred. I am very greatly obliged to me learned friend. Me learned friend is perfectly right, melud; the prevailing wind is south-west, melud; and, melud, on the fifth day the presence of the whale began to be offensive to the inhabitants of Pudding Magna. They therefore looked with confidence to the Crown to remove to a more convenient place the remnant of the Crown's property —

Sir Wilfred (aside). For which they had no use.

Sir Ethelred. Really, melud, me learned friend must not whisper insinuations of that kind under his breath; really, melud, I am entitled to resent, melud —

The Court. Go on, Sir Ethelred.

Sir Ethelred. Your lordship is extraordinarily handsome and good. Accordingly, melud, the Mayor of Pudding Magna addressed a humble petition to the Home Secretary, melud, begging him to acquaint His Majesty with the arrival of his property and praying for its instant removal. And by a happy after-thought, melud, a copy of this petition was sent to the Minister of Agriculture and Fisheries.

Happy, melud, for this reason, that the original communication appears to have escaped the notice of the Home Secretary entirely. At the Ministry of Agriculture and Fisheries, however, the Mayor's letter was handed to a public servant named Sleep, a new-comer to the Service, and one, it seems, who combined with a fertile imagination an unusual incapacity for the conduct of practical affairs. This gentleman has now left the public service, melud, and will be called.

It appears, melud, that, when the Mayor's letter had been lying unconsidered on Mr. Sleep's desk for several days, the following telegram was handed to him: —

The Whale

TO THE KING LONDON WHALE REFERRED TO IN
PREVIOUS COMMUNICATION NOW IN ADVANCED
STAGES DECOMPOSITION WIND SOUTH-WEST
HUMBLY PETITION PROMPT ACTION

TINRIB.

Mr. Sleep, melud, according to his own account, turning the matter over in his sagacious mind, at once hit upon a solution which would be likely to satisfy the requirements of His Majesty's Treasury with regard to public economy. Two days later, therefore, a letter was addressed to the Director of the Natural History Museum, informing him that an unusually fine specimen of *Balaena Biscayensis* was now lying in Pudding Bay, and that the Minister was authorised by His Majesty to offer the whale to the Museum in trust for the nation, the Museum to bear the charges of collection and transport.

On July 3rd, melud, the Secretary to the Natural History Museum replied that he was asked by the Director to express his regret that, owing to lack of space, the Museum was unable to accept His Majesty's gracious offer. He was to add that the Museum was already in possession of three fine specimens of *Balaena Biscayensis*.

Melud, for some days, it appears, Mr. Sleep took no further action. Meanwhile, melud, the whale had passed from the advanced to the penultimate stages of decomposition and had begun to poison the sea at high-water, thereby gravely impairing the fishermen's livelihood. Mr. Tinrib, melud, was in constant, if one-sided, correspondence with Mr. Sleep; and on the 12th of July, melud, Mr. Sleep lunched with a friend and colleague at the Admiralty, Mr. Sloe. While they were engaged, melud, upon the discussion of fish, the topic of whales naturally arose, and Mr. Sleep, melud, unofficially, melud, expressed to Mr. Sloe the opinion that the Ministry of Agriculture and Fisheries would be willing to grant to the Admiralty the use of the whale for the purposes of target-practice; and he suggested that one of His Majesty's ships should be immediately detailed to tow His Majesty's whale out to sea. He also pointed out the peculiar advantages of such a target for the exercise of such vessels as were called upon to fire at submarines. Mr. Sloe, melud, undertook to explore the opinion of the Admiralty on the proposal, and the conference broke up.

That was on the 12th. On the 17th, melud, at a further lunch, Mr. Sloe, unofficially, melud, intimated to Mr. Sleep that he could find no support among their Lordships of the Admiralty for the proposal of the Ministry of Agriculture and Fisheries; for, while excellent practice was to be had from a disappearing target, their Lordships could not sanction the expenditure of ammunition on a target which must, at most ranges, be quite invisible. Further, it was their opinion that by the date of the Autumn firing-practices the whale would have suffered dissolution by the ordinary processes of nature.

The inhabitants of Pudding Magna, melud, did not share this view. On the 20th, melud, Mr. Tinrib and a deputation waited upon Mr. Sleep. They pointed out to Mr. Sleep that all fishing was suspended in Pudding Bay; that Pudding Magna was now barely inhabitable except on the rare occasions of a northerly wind; that the majority of the citizens had fled to the hills and were living in huts and caves. They further inquired, melud, whether it would be lawful for the fishermen themselves to destroy the whale, so far as that could be done, with explosives, and, if so, whether the Crown would refund the cost of the explosives, which might be considerable. As to this, melud, Mr. Sleep was unable to accept the responsibility of expressing an opinion; but the whale was undoubtedly Crown property, and he questioned gravely whether the Treasury would sanction the expenditure of public money on the destruction of Crown property by private citizens. He also pointed out that the Treasury, if approached, would be likely to require a strict account of any whalebone, blubber and other material extracted from the whale's carcase. Mention of explosives, however, had suggested to his mind that possibly the War Office might be interested in the whale, and he undertook to inquire. The deputation agreed, melud, that this perhaps would be the better course, and withdrew.

On the 24th, melud, a letter was despatched to the War Office pointing out that the whale now lying in Pudding Bay offered excellent opportunities for the training of Engineers in the removal of obstacles, and could well be made the centre of any amphibious operations, landing-parties, invasions, etc., that might form part of the forthcoming manœuvres. The War Office would doubtless take note of the convenient proximity of the whale to the Tank Corps Depôt at Lulworth.

The Whale

On the 31st, melud, the War Office replied that the destruction of whales by Tanks was no longer considered a practicable operation of war, and that no part of the forthcoming manœuvres would be amphibious.

From this date, melud, Mr. Sleep seems to have abandoned his efforts. At any rate, on the 4th of August, Mr. Tinrib received the following evasive and disgraceful communication: —

“WHALE, CARCASE OF.

DEAR SIR, — I am desired by the Minister of Agriculture and Fisheries to observe that your representations to this Department appear to have been made under a misapprehension. It should hardly be necessary to state that the whale is not a fish but a mammal. I am therefore to express regret that the Ministry of Agriculture and Fisheries can accept no responsibility in the matter.”

In these circumstances, melud, the inhabitants, or I should say the *late* inhabitants, of Pudding Magna have been compelled to institute these proceedings, and humbly pray —

The case was adjourned. A.P.H.

GB